

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
August 20, 2002 Session

STATE OF TENNESSEE v. JAMES WOODMANCY

Appeal from the Criminal Court for Sullivan County
No. S44,173 R. Jerry Beck, Judge

No. E2001-02323-CCA-R3-CD
September 30, 2002

The defendant, James Woodmancy, was convicted of third offense indecent exposure. The trial court imposed a sentence of two years. See Tenn. Code Ann. § 39-13-511. In this appeal as of right, the defendant challenges the sufficiency of the evidence and asserts that the trial court erred by ruling that evidence of his prior conviction for attempted aggravated sexual battery could be introduced by the state to impeach his testimony. Because the trial court should have ruled the prior offense inadmissible, the conviction is reversed and the cause is remanded for a new trial.

Tenn. R. App. P. 3; Judgment of the Trial Court Reversed and Remanded

GARY R. WADE, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

William A. Kennedy, Assistant Public Defender, for the appellant, James Woodmancy.

Paul G. Summers, Attorney General & Reporter; Mark A. Fulks, Assistant Attorney General; and Teresa Murray-Smith and Jim Goodwin, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

On the afternoon of May 20, 1999, the then-nine-year-old victim, A.P.,¹ and her family went to the Fort Henry Mall in Kingsport. While her mother, Cecilia Pierce, watched her younger brother, the victim and a friend played hide-and-seek nearby. As the victim hid under a car on display in a common area of the mall, she said aloud, “I guess I’ll hide under here.” A man that she later identified as the defendant overheard the remark and answered, “Go ahead.” According to the victim, when she hid under the rear of the vehicle and looked in the direction of the defendant, his pants were unzipped and his penis was exposed. She described the defendant, who was carrying a black folder or notebook, as wearing a beige shirt, blue jeans, and a navy blue baseball cap. When

¹It is the policy of this court not to reveal the names of children who are victims of sex crimes.

the victim got from beneath the vehicle and moved toward her mother, who was nearby, the defendant walked toward a mall exit. Although the victim and her family looked for the defendant, they did not see him again until they were leaving the mall. The victim's father followed the defendant into a Piccadilly restaurant while her mother went to inform security.

At trial, Cecilia Pierce testified that she was sitting on a bench approximately 25 feet from where the victim and her friend were playing in the Fort Henry Mall. She recalled that the victim, who was upset and crying, claimed that a "man had unzipped his pants and was not wearing underwear." When Ms. Pierce asked her to identify the perpetrator, the victim pointed to the defendant, who was wearing a beige t-shirt, blue jeans, and a navy blue baseball cap and carrying a black leather binder. Ms. Pierce attempted to follow the defendant, but lost sight of him and then reported the incident to security. She recalled that when they left the mall approximately two hours later, she saw the defendant entering the mall near Piccadilly. As Ms. Pierce contacted security, her husband followed the defendant into the restaurant.

Lisa Jones, a security guard on duty in the mall at the time of the offenses, testified that at approximately 5:00 or 5:30 p.m., the victim's father reported that a man had exposed himself to the victim. She broadcast a description of the man over her radio to other officers in the mall and then escorted the victim and her mother to the security office.

George Robinette, the security supervisor on duty, interviewed both the victim and her mother and then completed an incident report. At trial, he testified that the perpetrator was described as a clean-shaven man wearing a dark baseball cap and beige pants. After completing the report, Robinette and other security officers searched the mall for the offender. At approximately 7:00 p.m., Ms. Pierce returned to his office and reported that the offender was in the Piccadilly restaurant in the mall. When Robinette questioned the defendant, he admitted that he had been in the mall earlier for lunch with his girlfriend, but denied having been there at 6:00 p.m. According to Robinette, the defendant claimed that he had had an appointment with a man named Tony, whose last name he could not recall. Robinette testified that Todd Malone, a Kingsport police officer, was present during the questioning and had advised the defendant of his Miranda rights. Robinette overheard the defendant, who had not been told the nature of the complaint, say to Officer Malone, "'Somebody said I exposed myself to someone.'" The defendant refused to consent to a search of his vehicle. A black portfolio-type folder on the front passenger seat could be seen from the exterior of the car.

Officer Malone recalled that the defendant was dressed in a beige shirt, blue jeans, and a blue ball cap. A black notebook like the one that had been described by the victim could be seen on the front seat of the defendant's vehicle. Officer Malone determined that the defendant was wearing underwear at the time of his arrest.

Mike Hickman, an off-duty Kingsport police officer assisting with mall security at the time of the offense, had just reported to work when he was notified that the suspect had been observed near the Piccadilly entrance. Officer Hickman testified that he and Robinette escorted the defendant

outside of the mall for questioning. The defendant was dressed in a beige t-shirt, blue jeans, and a navy blue ball cap. Officer Hickman recalled that the defendant denied having been at the mall at the time of the incident, but that he admitted having been there at approximately 2:00 p.m. to drop off lunch for his girlfriend. When asked what time he had arrived at the mall the second time, the defendant answered that he was just there to pick up his girlfriend and had not been on the upper level, where the incident took place. Officer Hickman observed that the driver's side window of the defendant's vehicle was down and a black notebook was on the front passenger's seat. He recalled that the defendant claimed that he had just arrived at the mall after concluding a business appointment with a man named Tony.

Laura Church was dating the defendant and working as an ophthalmic technician at a LensCrafters branch in the Fort Henry Mall at the time of the incident. She stated that the defendant met her at LensCrafters at 2:00 p.m. for lunch and they ate on the benches outside of the mall entrance near Piccadilly. Ms. Church testified that after a 30-minute lunch, the defendant walked her back to work. She did not see him for the rest of the day. According to Ms. Church, the defendant was wearing a knee brace and walked with a limp. She confirmed that he was dressed in blue jeans, a beige shirt, and a navy blue baseball cap.

Janine Ramsey testified that at approximately 2:45 p.m. on the day of the incident, she and her date were eating at Garfield's, a restaurant in the mall, when the defendant arrived. She recalled her date left some 15 minutes later and that she and the defendant then left the restaurant and walked together in the mall until approximately 4:30 p.m. She remembered that the defendant was wearing a leg brace at the time.

Diana Lee testified that she met the defendant at Garfield's between 4:00 and 4:30 p.m. and that they then drove to a nearby Shoney's restaurant to discuss their sales business. Ms. Lee claimed that she and the defendant, who was wearing a knee brace, talked until approximately 6:25, when she drove him to his car in the mall parking lot. While Ms. Lee could not remember the clothing the defendant was wearing, she did recall that he was carrying a black day-timer.

John Baker, who knew the defendant through karate school, testified that he saw the defendant on two separate occasions on the day of the offense. He stated that he first saw the defendant at approximately 10:00 a.m. when he went to a Burger King restaurant in Blountville and then saw him at 5:45 or 6:00 p.m. at a Shoney's restaurant in Kingsport. Baker testified that the defendant was initially alone, but that there were two cups at his table and a woman joined him later. Baker stated that when he left the restaurant at approximately 6:30 p.m., the defendant was still there. Baker acknowledged that the defendant was dressed in a khaki shirt and blue jeans and that he was carrying his black day-timer.

I

Initially, the defendant contends that the evidence was insufficient. On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which

might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

The statute defining the offense of indecent exposure provides in pertinent part as follows:

A person commits the offense of indecent exposure who, in a public place as defined in § 39-11-106, or on the private premises of another, or so near thereto as to be seen from such private premises:

(A) Intentionally:

(i) Exposes such person's genitals or buttocks to one (1) or more persons; or

(ii) Engages in sexual contact or sexual penetration as defined in § 39-13-501;

and

(B) Reasonably expects the acts will be viewed by another and such acts:

(i) Will offend an ordinary viewing person; or

(ii) Are for the purpose of sexual arousal and gratification of the defendant.

...

Tenn. Code Ann. § 39-13-511(b)(1) (1998 Supp.) "Public place" means

a place to which the public or a group of persons has access and includes, but is not limited to, highways, transportation facilities, schools, places of amusement, parks, places of business, playgrounds and hallways, lobbies and other portions of apartment houses and hotels not constituting rooms or apartments designed for actual residence. An act is deemed to occur in a public place if it produces its offensive or proscribed consequences in a public place.

In our view, the evidence was sufficient to support the conviction. The victim testified that the defendant exposed his genitals to her at the Fort Henry Mall, a public place. There was no indication that the exposure was accidental. Because the defendant's pants were not unzipped until the victim was under the vehicle, a rational trier of fact could have inferred that the conduct was intentional. Likewise, the evidence demonstrates that the defendant, who immediately fled the scene,

was aware of the victim's presence and intended for her to observe him exposing his genitals, conduct that qualifies as offensive and perhaps indicative of sexual gratification as a motivation.

The defendant argues that because there were discrepancies in his description and because he provided a "clear alibi," the jury's verdict is unsupported. The proof, however, established that the victim had a good opportunity to observe the defendant. Other witnesses confirmed that the defendant's appearance matched the victim's description of the offender. Although the defendant presented alibi testimony, it differed from his initial explanation to the investigating security and police officers. Furthermore, issues of identity and credibility are classic jury questions. The jury accredited the testimony of the state's witnesses, as was its prerogative. See State v. Summerall, 926 S.W.2d 272, 275 (Tenn. Crim. App. 1995). In our view, the evidence was sufficient for a rational trier of fact to have found beyond a reasonable doubt that the defendant committed the crime of indecent exposure.

II

Next, the defendant asserts that the trial court erred by determining that his prior conviction for attempted aggravated sexual battery would be admissible for impeachment purposes if he testified at trial. The state argues that the conviction would have been admissible on cross-examination to attack the defendant's credibility.

Rule 609 of the Tennessee Rules of Evidence provides in relevant part as follows:

For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime may be admitted if the following procedures and conditions are satisfied:

* * *

(2) The crime must be punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or, if not so punishable, the crime must have involved dishonesty or false statement.

(3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conviction before trial, and the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

Tenn. R. Evid. 609(a)(2) – (3).

In determining whether the probative value of a prior conviction on the issue of credibility is outweighed by its prejudicial effect on the substantive issues, a trial court should “first analyze the relevance the impeaching conviction has to the issue of credibility.” State v. Mixon, 983 S.W.2d 661, 674 (Tenn. 1999). If the conviction is probative of the defendant’s credibility, the trial court must then “‘assess the similarity between the crime on trial and the crime underlying the impeaching conviction.’” Id. (quoting Neil P. Cohen et al., Tennessee Law of Evidence § 609.9 (3d ed. 1995)). Our high court has described the balancing process as follows:

When an impeaching conviction is substantially similar to the crime for which the defendant is being tried, there is a danger that jurors will erroneously utilize the impeaching conviction as propensity evidence of guilt and conclude that since the defendant committed a similar offense, he or she is probably guilty of the offense charged. Accordingly, the unfair prejudicial effect of an impeaching conviction on the substantive issues greatly increases if the impeaching conviction is substantially similar to the crime for which the defendant is being tried. Therefore, trial courts should carefully balance the probative value of the impeaching conviction on credibility against its unfairly prejudicial effect on substantive issues.

Mixon, 983 S.W.2d at 674 (citations omitted). A trial court’s ruling under Rule 609 will not be reversed absent an abuse of discretion. See Johnson v. State, 596 S.W.2d 97, 104 (Tenn. Crim. App. 1979).

Here, the trial court held a jury-out hearing and determined that because credibility was a key issue at trial, the probative value of the defendant’s attempted aggravated sexual battery conviction outweighed any unfair prejudice. The trial court failed, however, to assess the relevance of the defendant’s prior conviction to credibility. Aggravated sexual battery is defined, generally, as unlawful sexual contact accomplished by a weapon or accompanied by serious bodily injury to the victim. See Tenn. Code Ann. § 39-13-504(a)(1) – (2). It is also defined as unlawful sexual contact where the defendant is aided or abetted by others and force or coercion is used or the victim is somehow incapacitated or where the victim is less than thirteen years of age. See Tenn. Code Ann. § 39-13-504(a)(3) – (4). The crime does not involve dishonesty or false statement. See State v. Steven O. Ford, No. 01C01-9403-CC-00089, slip op. at 11 (Tenn. Crim. App., at Nashville, Sept. 14, 1995).

In our view, evidence of a conviction for attempted aggravated sexual battery would offer the jury little insight into the defendant’s credibility. Moreover, an attempted aggravated sexual battery conviction is sufficiently similar to the crime for which the defendant was on trial to give rise to unfair prejudice. The state correctly points out that the two crimes do not share any behavioral elements. Nevertheless, both crimes are sex offenses and share the critical element of being committed for the purpose of sexual arousal or gratification. See Tenn. Code Ann. § 39-13-501(6) (defining “sexual contact” as contact that “can be reasonably construed as being for the purpose of sexual arousal or gratification”). Evidence of the defendant’s attempted aggravated sexual battery conviction would have created a danger of the jury’s concluding “that since the defendant committed

a similar offense, he . . . is probably guilty of the offense charged.” See Mixon, 983 S.W.2d at 674. Because the conviction for attempted aggravated sexual battery had minimal probative value as to the defendant’s credibility while presenting a significant danger of unfair prejudice, the trial court should have barred admission of the evidence.

An error in the conduct of a trial, under circumstances such as these, warrants reversal only when it “affirmatively or more probably than not affected the judgment to the defendant’s prejudice.” State v. Galtmore, 994 S.W.2d 120, 125 (Tenn. 1999). A defendant claiming error need not show that he did not testify because of the adverse ruling on impeachment by the prior conviction. Id. at 123. Nor does he need to make an offer of proof. Id. at 125. There must, however, be some evidence or argument regarding the substance of the defendant’s contemplated testimony and the theory of defense for which it was critical. State v. Taylor, 993 S.W.2d 33, 35 (Tenn. 1999).

In State v. Mixon, the defendant was convicted of attempted rape, attempted incest, sexual battery, public intoxication and evading arrest. The trial court interpreted Rule 609 as permitting impeachment of a criminal defendant by any felony and allowed the state to cross-examine the defendant regarding a prior conviction for aggravated sexual battery. 983 S.W.2d at 674. Our supreme court held that evidence of the conviction should have been excluded under the Rule 609 balancing test and determined that the error required reversal of the defendant’s attempted rape, attempted incest, and sexual battery convictions:

This trial was strictly a credibility contest. The only proof that a crime occurred was the testimony of A.M. While admitting before the jury that he was guilty of public intoxication and evading arrest, Mixon testified unequivocally that he had not touched A.M. nor made inappropriate comments to her. The defendant instead said that he had argued with A.M. about her involvement with an eighteen-year-old male. While there is testimony in the record that A.M. had been crying and hysterical, this testimony certainly is not contradictory of Mixon's account of the incident. Obviously, because of the nature of the alleged touching, there is no medical proof in the record to corroborate A.M.'s testimony. During closing argument, the State repeatedly emphasized the prior sexual battery conviction. After acknowledging that, "this case comes down to a question of credibility," the State reminded the jury:

[y]ou know about his credibility. You know about his past. The Court will tell you about impeachment. And I submit that the conviction of this defendant for the crimes in Mississippi of sexual battery, should be used to impeach his testimony--impeach his testimony. He is not to be believed. He is not to be believed. So you have to decide who you want to believe--him or her?

Unlike other situations in which the improper use of an impeaching conviction has been held to constitute harmless error, the evidence of guilt in this case is not overwhelming and the State emphasized the conviction to the jurors when

urging them to find the defendant guilty. Under these circumstances we conclude that the trial court erred by allowing the State to use the sexual battery conviction to impeach the defendant's testimony, and the error is prejudicial because it affirmatively appears to have affected the verdict. . . .

Id. at 675.

The ruling in Mixon, as we interpret it, requires a reversal of this conviction. The defendant asserts that he chose not to testify only because of the adverse ruling on the attempted aggravated sexual battery conviction. Like the trial in Mixon, this trial was primarily a credibility contest. There was no physical evidence of the crime. The defense was one of mistaken identity and alibi. During her closing argument, the prosecutor repeatedly stressed that the case hinged upon the truthfulness of the various witnesses:

In a very perfect world, we would have had a video tape of this. There would have been some physical evidence proving that he was there rather than just some people's words against other people's words. . . . It is not perfect, . . . and that's why we are here. And that's why you are there in the difficult situation that you are going to be in of judging the credibility of the witnesses because this is the classic "one side said it happened, one side said it didn't." . . .

Although the defendant was able to introduce alibi evidence through other witnesses, the testimony of those witnesses cannot substitute for the defendant's own in a case where credibility is the sole issue. The defendant was entitled to testify and have the jury assess his credibility without knowledge of his prior offense.

Accordingly, the conviction is reversed and the cause is remanded for a new trial.

GARY R. WADE, PRESIDING JUDGE